No. 97-371

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

Supreme Court, U.S.
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NATIONAL ENDOWMENT FOR THE ARTS, *et al.*,

Petitioners,

—v.—

KAREN FINLEY, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether 20 U.S.C. §954(d)(1), which requires the National Endowment for the Arts to consider "general standards of decency and respect for the diverse beliefs and values of the American public" in judging applications for arts grants in a program designed to support a diverse range of private expression, violates the First and Fifth Amendments because it is viewpoint-based, vague, and restricts what artists create with nonfederal funds.

RULE 29.6 STATEMENT

This brief is filed on behalf of four individuals and one nonprofit corporation, the National Association of Artists' Organizations (NAAO). NAAO does not have any parent or subsidiary companies.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

1. Establishment Of The National Endowment For The Arts 1
2. The Battle Over Controversial Art And Enactment Of The "Decency And Respect" Clause 4
3. The Endowment's Implementation Of The "Decency And Respect" Clause 6
4. Effects Of The "Decency And Respect" Clause On Private Speech 8
5. The Current Litigation 9

SUMMARY OF ARGUMENT 12

ARGUMENT 16

I. THE CONSTITUTIONAL ISSUES CANNOT BE AVOIDED BY STATUTORY CONSTRUCTION 16

A. The Government's Interpretation, Even If Accepted, Would Not Avoid The Constitutional Issue 16

B. The Government's Interpretation Of The "Decency And Respect" Clause Is Contrary To The Statute's Plain Language, The Intent Of Congress, And The NEA's Own Implementation 18

Page

II. THE "DECENCY AND RESPECT" CLAUSE VIOLATES THE FIRST AMENDMENT BY IMPOSING VIEWPOINT-BASED CRITERIA ON A GOVERNMENT PROGRAM DESIGNED TO SUPPORT PRIVATE ARTISTIC EXPRESSION 21

A. The "Decency And Respect" Clause Discriminates On The Basis Of Viewpoint 23

B. The First Amendment Requires Viewpoint Neutrality Where, As Here, A Government Program Funds A Diverse Range Of Private Expression . . . 28

C. Viewpoint Neutrality Is Required In Government Funding Of The Arts Because The Arts, Like The Academy, Is A "Traditional Sphere Of Free Expression" 30

D. The Government's Approach Would Render Viewpoint-Discriminatory Selective Subsidies Self-Justifying 33

1. The NEA's Selectivity Does Not Justify Viewpoint Discrimination . . . 34

2. Art Is Entitled To No Less Protection Against Viewpoint Discrimination Than Other Forms Of Speech 36

Page

3. The First Amendment Does Not Require An Empirical Showing That Government Regulation Has Skewed The Marketplace Of Ideas . . 37

4. The First Amendment Prohibits Viewpoint-Based Criteria Without Regard To Whether They Operate As Absolute Bars To Funding Or Negative Factors To Consider 39

III. THE DECENCY AND RESPECT CLAUSE IS VOID FOR VAGUENESS 41

A. Government Programs Allocating Subsidies To Private Speech Are Subject To Constitutional Vagueness Standards 42

B. Artistic Excellence Is Not Vague Because It Relies Upon A Common Core Of Professional Expertise And Does Not Create A Chilling Effect 44

IV. THE "DECENCY AND RESPECT" CLAUSE IS AN UNCONSTITUTIONAL CONDITION 48

CONCLUSION 50

TABLE OF AUTHORITIES

Page

Cases

Ackerley Communications of Massachusetts, Inc. v. City of Somerville,
878 F.2d 513 (1st Cir. 1989) 49

ACLU v. Reno,
929 F.Supp. 824
(E.D.Pa. 1996),
aff'd, 117 S.Ct. 2329 (1997) 47

Arkansas Writers Project, Inc. v. Ragland,
481 U.S. 221 (1987) 30, 39

Attorney General v. Soto-Lopez,
476 U.S. 898 (1986) 40

Baggett v. Bullitt,
377 U.S. 360 (1964) 42, 43

Bella Lewitzsky Dance Foundation v. Frohnmayer,
754 F.Supp. 774 (C.D.Cal. 1991) 5, 37, 44

Bethel School Dist. No. 403 v. Fraser,
478 U.S. 675 (1986) 25

Big Mama Rag, Inc. v. United States,
631 F.2d 1030 (D.C.Cir. 1980) 43

Board of Airport Commissioners v. Jews for Jesus,
482 U.S. 569 (1987) 43

Board of Curators v. Horowitz,
435 U.S. 78 (1978) 45

Page

Bowen v. Georgetown Univ. Hospital,
488 U.S. 204 (1988) 21

Browzin v. Catholic University of America, 527 F.2d 843 (D.C. Cir. 1975) 45

Bullfrog Films, Inc. v. Wick,
847 F.2d 502 (9th Cir. 1988) 43

Burstyn v. Wilson,
343 U.S. 495 (1952) 41

Cammarano v. United States,
358 U.S. 498 (1959) 22

Chevron U.S.A. v. Natural Resources Defense Council,
467 U.S. 837 (1984) 20, 21

City Council of Los Angeles v. Taxpayers for Vincent,
466 U.S. 789 (1984) 22

City of Lakewood v. Plain Dealer Pub. Co.,
486 U.S. 750 (1988) 17, 40, 42, 43, 44

Coates v. Cincinnati,
402 U.S. 611 (1971) 42

Cohen v. California,
403 U.S. 15, 26 (1971) 25, 26

Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.,
473 U.S. 788 (1985) 22, 30

Cramp v. Board of Public Instruction,
368 U.S. 278 (1961) 43

Page

Dawson v. Delaware,
503 U.S. 159 (1992) 40

Demarest v. Manspeaker,
498 U.S. 184 (1991) 21

Denver Area Educational Telecommunications Consortium, Inc. v. FCC,
__ U.S. __, 116 S.Ct. 2374 (1996) 25

FCC v. League of Women Voters,
468 U.S. 364 (1984) 28, 39, 48

FCC v. Pacifica Foundation, Inc.,
438 U.S. 726 (1978) 26

Forsyth County v. Nationalist Movement,
505 U.S. 123 (1992) 43, 49

Freytag v. Commissioner of Internal Revenue,
501 U.S. 868 (1991) 19

Gay Men's Health Crisis v. Sullivan,
792 F.Supp. 278 (S.D.N.Y. 1992) 43

Gentile v. State Bar,
501 U.S. 1030 (1991) 45

George Moore Ice Cream Co. v. Rose,
289 U.S. 373 (1933) 19

Gutzwiller v. Fenik,
860 F.2d 1317 (6th Cir. 1988) 45

Hannegan v. Esquire, Inc.,
327 U.S. 146 (1946) 30

Page

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.,
515 U.S. 557 (1995) 36

Jacobellis v. Ohio,
378 U.S. 184 (1964) 46

Keyishian v. Board of Regents,
385 U.S. 589 (1967) 27, 30, 35, 39, 42, 43, 44

Lamb's Chapel v. Center Moriches Union Free School Dist.,
508 U.S. 384 (1993) 21, 23, 28, 39

Law Students Civil Rights Research Council v. Wadmond
401 U.S. 154 (1971) 45

Luke Records, Inc. v. Navarro,
960 F.2d 134 (11th Cir. 1992) 46

Miller v. California,
413 U.S. 15 (1973) 46

Mt. Healthy City School District Board of Education v. Doyle,
429 U.S. 274 (1977) 41

NAACP v. Button,
371 U.S. 415 (1963) 40

Ozonoff v. Berzak,
744 F.2d 224 (1st Cir. 1984) 40

Pennsylvania Dep't of Pub. Welfare v. Davenport,
495 U.S. 552 (1990) 19

Pope v. Illinois,
481 U.S. 497 (1987) 46

R.A.V. v. City of St. Paul,
505 U.S. 377 (1992) 26

Regan v. Taxation With Representation,
461 U.S. 540 (1983) 22, 36

Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985) 45

Reno v. ACLU,
__ U.S. __, 117 S.Ct. 2329 (1997) 26

Rosenberger v. Rector & Visitors of the University of Virginia,
515 U.S. 819 (1995) . . . . . *passim*

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500 U.S. 173 (1991) . . . . . *passim*

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961 F.2d 1125 (3d Cir.),
cert. denied, 506 U.S. 908 (1992) 45

Seminole Tribe of Florida v. Florida,
__ U.S. __, 116 S.Ct. 1114 (1996) 19

Shamloo v. Mississsippi State Board of Trustees,
620 F.2d 516 (5th Cir. 1980) 43

Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.,
502 U.S. 105 (1991) 27, 38

Smiley v. Citibank (South Dakota) N.A.,
__ U.S. __, 116 S.Ct. 1730 (1996) 21

Smith v. Goguen,
415 U.S. 566 (1974) 11

Sweezy v. New Hampshire,
354 U.S. 234 (1957) 31, 35

Terminiello v. Chicago,
337 U.S. 1 (1949) 27

Texas v. Johnson,
491 U.S. 397 (1989) 27, 36

Thornhill v. Alabama,
310 U.S. 88 (1940) 40

United States v. Eichman,
496 U.S. 310 (1990) 27

United States v. Locke,
471 U.S. 84 (1985) 19

United States v. One Book Entitled Ulysses,
72 F.2d 705 (2d Cir. 1934) 46

University of Pennsylvania v. EEOC,
493 U.S. 182 (1990) 35

Wieman v. Updegraff
344 U.S. 183 (1952) 43

Zahorick v. Cornell University,
729 F.2d 85 (2d Cir. 1984) 45

Statutes and Regulations

20 U.S.C. §951(3) 31

20 U.S.C. §951(4) 31

	Page
20 U.S.C. §951(5) (1965)	1, 31
20 U.S.C. §953(c)	1
20 U.S.C. §954 (1965)	2
20 U.S.C. §954(d)	19
20 U.S.C. §954(d)(1)	*passim*
20 U.S.C. §954(e)	38
20 U.S.C. §955(b)	1
20 U.S.C. §956(c)	33
20 U.S.C. §959(c)	6, 19, 20
Pub. L. No. 101-121, §304(a), 103 Stat. 701 (1989)	5

Legislative History

111 Cong.Rec. 23963 (1965)	3
111 Cong.Rec. 23969 (1965)	3
135 Cong.Rec. 9789 (1989)	5
135 Cong.Rec. 16284 (1989)	2
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136 Cong.Rec. 28631 (1990)	6, 20, 24
136 Cong.Rec. 28672 (1990)	20
136 Cong.Rec. S17979 (Oct. 24, 1990)	4
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	Page
H.R. Rep. No. 618, 84th Cong. 1st Sess. *reprinted in* 1965 U.S.C.C.A.N. 3186	1
S. Rep. No. 300, 89th Cong., 1st Sess. at 4 (1965)	2, 3, 31
Department of the Interior and Related Agencies Appropriations for 1992, Hearings Before the Subcommittee on the Department of the Interior and Related Agencies of the House Committee on Appropriations, 102d Cong., 1st Sess. (Feb. 21, 1991)	7, 8, 9, 32, 50
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Fiscal Year 1992 Application Guidelines for NEA Theater Grants 9

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STATEMENT OF THE CASE

1. Establishment Of The National Endowment For The Arts

Congress created the National Endowment for the Arts (NEA) in 1965 "to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry, but also the material conditions facilitating the release of this creative talent." 20 U.S.C. §951(5) (1965). In response to concerns that government support for the arts might lead to "attempts at political control of culture," H.R. Rep. No. 618, 84th Cong. 1st Sess. 21, *reprinted in* 1965 U.S.C.C.A.N. 3186, 3205, Congress took several steps to insulate the agency from political pressures, and to insulate private grantees' speech from government control.

First, it enacted a provision, immediately following the statute's statement of purpose, that forbade the Endowment from "exercis[ing] any direction, supervision, or control over the policy determination, personnel, or curriculum, or the administration or operation of any school or other non-Federal agency, institution, organization, or association." 20 U.S.C. §953(c). The House Report described this provision as an "assurance against federal interference in the arts." H.R. Rep. No. 618, *supra* at 15, 1965 U.S.C.C.A.N. at 3200.

Second, Congress made the Endowment an agency of arts professionals guided by artistic merit rather than of politicians who might be driven by political concerns. It required that the NEA's decisionmakers -- the Chair and the National Council -- be experts in the arts. 20 U.S.C. §955(b).[1] And it articulated criteria for funding based on

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[1] As one of the NEA's original sponsors later explained, "[w]hen we structured the Endowment, we were careful to put the artistic decisionmaking in the hands of outside experts and away from the (continued...)

artistic merit. *See* 20 U.S.C. §954 (1965). As the Senate Report explained, the overriding standard for grants would be "artistic and humanistic excellence." S. Rep. No. 300, 89th Cong., 1st Sess. at 4 (1965).[2]

Third, the Senate Report devoted an entire section to "Freedom of Expression," mandating that the agency give "the fullest attention" to artistic freedom of expression:

> It is the intent of the committee that in the administration of this act there be given the fullest attention to freedom of artistic and humanistic expression. One of the artist's and humanist's great values to society is the mirror of self-examination which they raise so that society can become aware of its shortcomings as well as its strengths. . . .
>
> Countless times in history artists and humanists who were vilified by their contemporaries because of their innovations in style or mode of expression have become prophets to a later age.
>
> Therefore, the committee affirms that the intent of this act should be the encouragement of free inquiry and expression . . . . [C]onformity for its own sake is not to be encouraged, and . . . no undue preference should be given to any particular style or school of thought or expression.

Id. at 3-4. As one member perhaps best summed it up, Congress's intent was to have "Government assistance, but not intervention . . . support but not control . . . stimulation but not participation."[3]

Over the course of its history, the NEA has made thousands of grants. While it is selective, its benefits are in fact quite widely distributed. Until last year, the NEA historically awarded grants to 60% of the arts organizations who applied; under its reduced funding last year the grant-to-application ratio was about 35%.[4] When individual and

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[1] (...continued)
influence of government . . . ." 135 Cong. Rec. 16284 (1989)(remarks of Senator Pell). Similarly, NEA Chairperson Frank Hodsoll testified in 1984: "[T]here would be no federal agencies to fund the arts and the humanities without statutory guarantees that Washington bureaucrats would not make the artistic content decisions involved in federally funded projects. Rather, these decisions were to be left to the individual artists and their organizations. The only criterion was to be artistic excellence, and that is the criterion used today." *Hearing on the Grant Making Process of the National Endowment for the Arts*, Before the Subcomm. on Postsecondary Educ. of the House Comm. on Educ. and Labor, 98th Cong., 2d Sess. 4-5 (June 28, 1984)(hereinafter "*1984 Grant Making Hearing*")(statement of Hodsoll).

[2] The reference to "humanistic" reflects the fact that Congress simultaneously created the National Endowment for the Humanities, which was and is organized on similar principles of funding private expression based on professional judgments of merit.

[3] 111 Cong. Rec. 23963 (1965)(remarks of Cong. Monagan). Along similar lines, Congressman Helstoski expressly addressed the fear that "there will be Federal interference in the work of the performing arts." 111 Cong. Rec. 23969 (1965). He responded:

> That is not so . . . . We have shown [in other settings] that there can be federal aid without federal control. In this legislation we propose to do the same thing. The Federal Government will supply the money, but the artists and their organizations will suggest the proposals, select the performances which are to be produced and do all the planning. The Federal Government will be the means, but the end product will be the sole responsibility of the performing artists.

Id.

[4] *Testimony of Jane Alexander, NEA Chairperson*, Before the (continued...)

organizational applicants are considered together, the agency has historically granted about two in seven applications.[5]

2. The Battle Over Controversial Art And Enactment Of The "Decency And Respect" Clause

It is hardly surprising that an agency committed both to artistic excellence and the free expression of its grantees has sometimes supported controversial art. In 1984, for example, Congressman Mario Biaggi criticized the Endowment for supporting a production of Verdi's *Rigoletto* by the Metropolitan Opera and the Virginia Opera Company that depicted several characters as members of the Mafia. Biaggi deemed the production disparaging of Italian-Americans, and proposed amending the NEA's statute to prohibit the use of funds in "any manner to denigrate any ethnic, racial, religious, or minority group." *See 1984 Grant Making Hearing, supra* note 1, at 2, 6. The amendment failed, and this and other controversies passed without making inroads on the core principle of artistic freedom that guided the NEA's creation. *See generally* Livingston Biddle, OUR GOVERNMENT AND THE ARTS: A PERSPECTIVE FROM THE INSIDE (1988).

In 1989, controversy erupted again, this time over the NEA's support of institutions that had displayed the photographs of Robert Mapplethorpe and Andres Serrano. Members of Congress objected vociferously to what they

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[4] (...continued)
Subcommittee on Early Childhood, Youth and Families of the House Comm. on Oversight and Investigations, May 13, 1997, 1997 WL 10571677 at *13.

[5] Between 1965 and 1988, the NEA received about 302,000 grant applications, and awarded approximately 85,000 grants. 136 Cong. Rec. S17979 (Oct. 24, 1990)(statement of Sen. Jeffords).

saw as Mapplethorpe's promotion of homosexuality and Serrano's "blasphemous" work, *Piss Christ*.[6] In response, Congress for the first time imposed on the Endowment ideological restrictions unrelated to artistic merit. Section 304(a) of Pub. L. No. 101-121, 103 Stat. 701, 741 (1989), provided that no funds appropriated for the NEA (or the NEH)

> may be used to promote, disseminate, or produce materials which in the judgment of the [NEA or NEH] may be considered obscene, including but not limited to, depictions of sado-masochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political or scientific value.

A district court declared this restriction unconstitutional in *Bella Lewitzsky Dance Foundation v. Frohnmayer*, 754 F.Supp. 774 (C.D.Cal. 1991), and the United States chose not to appeal.

The controversy continued and, in 1990, Congress amended the NEA statute again, adding the provision at issue in this case. It requires the NEA in judging arts applications to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public." 20 U.S.C. §954(d)(1). As Representative Paul Henry, the provison's author, described it, "[t]his substitute includes language in the heart of the

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[6] Senator Jesse Helms, perhaps the leading critic, stated that "[i]t is an issue of soaking the taxpayer to fund the homosexual pornography of Robert Mapplethorpe, who died of AIDS while spending the last years of his life promoting homosexuality." 135 Cong. Rec. 22372 (1989)(remarks of Sen. Helms). And he attacked Serrano's *Piss Christ* as "blasphemy" that "taunted the American people . . . in terms of Christianity." 135 Cong. Rec. 9789 (1989).

grantmaking process. We add to the criteria of artistic excellence and artistic merit, a shell, a screen, a viewpoint that must constantly be taken into account." 136 Cong.Rec. 28631 (1990). The amendment does not define "decency"or "respect"; nor does it explain how the "beliefs and values of the American public" are to be identified and considered.[7]

Debate on the "decency and respect" clause underscored Congress's purpose: to stop funding art that might offend the "American public's" beliefs and values. Representative Coleman explained that he sponsored the bill because "[w]orks which deeply offend the sensibilities of significant portions of the public ought not to be supported with public funds." *Id.* at 28624. And Representative Alexander supported the bill because it addressed his concern that "the Endowment's support for artists like Robert Mapplethorpe and Andres Serrano has offended and angered many citizens in my district." 136 Cong.Rec. 28642 (1990).

3. The Endowment's Implementation Of The "Decency And Respect" Clause

In December 1990, a month after passage of §954(d)(1), the National Council on the Arts, a 26-member body which advises the Chair on policy and grant recommendations, addressed how to enforce the "decency and respect" language. The Council resolved that peer review panels would apply the new standards "as a matter of course because each panelist brought to the table their community's standards of decency and this would become part of the deliberative process." J.A. 12. In keeping with this resolution, NEA officials instructed peer review panel

[7] At the same time, Congress also made several other changes, including a requirement that the Chair select diverse peer review panels. 20 U.S.C. §959(c).

members to "bring to the table those values that the statute states." J.A. 85; *see also id.* at 33 ("the basic instruction that the panels receive [is] that . . . you bring with you your general standards of decency from your communities, from you[r] backgrounds, from your ethnic backgrounds, and that is how we deal with it"). NEA Chairperson Frohnmayer explained to Congress that:

> no one individual is wise enough to be able to consider general standards of decency and the diverse values and beliefs of the American people all by him or herself. These are group decisions. They are made by the National Council on the Arts as well as by the panelists.[8]

In implementing §954(d)(1), therefore, the NEA declined to clarify the statutory terms, and instead delegated interpretation and enforcement of the "decency and respect" requirement to the judgments of hundreds of peer review panel members, 26 National Council members, and the Chairperson.

[8] *Department of the Interior and Related Agencies Appropriations for 1992*, Hearings Before the Subcommittee on the Department of the Interior and Related Agencies of the House Committee on Appropriations, 102d Cong., 1st Sess. 234 (1991)(testimony of Frohnmayer). When pressed as to whether he himself would apply the "decency" standard in his review of grant recommendations, Frohnmayer stated that if he thought the panel or Council had made a mistake with respect to the decency determination, he would "send it back to them." *Id.* Frohnmayer's successor, Anne-Imelda Radice, testified that she would apply the "decency" criteria in reviewing applications. *Department of the Interior and Related Agencies Appropriations for 1993*, Hearings Before the Subcommittee on the Department of the Interior and Related Agencies of the House Committee on Appropriations, 102d Cong., 2d Sess. 613-14 (1992)(testimony of Radice).

4. Effects Of The "Decency And Respect" Clause On Private Speech

The "decency and respect" clause had immediate and widespread chilling effects on the arts community, as illustrated by uncontroverted testimony from Charlotte Murphy, Executive Director of respondent National Association of Artists' Organizations (NAAO), whose hundreds of member institutions and artists regularly apply for and receive NEA funding.

Ms. Murphy explained that because "new and contemporary art of the type presented or created by many NAAO members is by definition often provocative and threatening to traditional or conservative values or notions of morality," NAAO members are "afraid that the 'general standards of decency' requirement will bar them from receiving NEA funding." J.A. 21-22. Some members did not apply for grants for fear that their work would contravene the "decency and respect" clause; others applied but were "chilled in their applications and in the scope of their projects by uncertainty about what the standard means or how to comply with it." J.A. 22-24.

Moreover, because the "decency and respect" clause dictates criteria the NEA must apply in judging grant applications, it affects what artists and institutions produce with nonfederal funds before applying for an NEA grant. As part of the grantmaking process, the NEA inevitably looks at "past performance evaluation and other pertinent information,"[9] including an applicant's prior "body of

[9] *Department of the Interior and Related Agencies Appropriations for 1992*, Hearings Before the Subcommittee on the Department of the Interior and Related Agencies of the House Committee on Appropriations, 102d Cong., 1st Sess. 232 (1991)(testimony of John Frohnmayer).

work."[10] Thus, "an artist whose work in the past might be considered 'indecent' is ... less likely to receive a grant today because of the decency requirement." J.A. 26.

In addition, NEA grants have a multiplier effect "because frequently private grantsmakers rely on the NEA's judgments in deciding whether to supply additional funds." J.A. 24. "Endowment grants serve as a major catalyst for leveraging nonfederal support. In FY 93, for example, Endowment grants of about $120 million generated matching funds estimated at $1.1 billion, a ten-fold match."[11] The reverse is also true: the NEA's rejection of an applicant affects the applicant's ability to obtain nonfederal funding.

5. The Current Litigation

This lawsuit was originally filed before the "decency and respect" clause was enacted, as a challenge to the NEA's politically motivated vetoes of unanimous peer review panel recommendations for grants to four performance artists, Karen Finley, John Fleck, Holly Hughes, and Tim Miller.[12] After Congress enacted the

[10] Exh. B. to Cole Declaration, *Fiscal Year 1992 Application Guidelines for NEA Theater Grants*, at 65 (separately lodged with the Court)(hereinafter "1992 Guidelines"). The current guidelines, also lodged with the Court, refer to the merits of the applicant, which can only be assessed by judging past work. NEA, *Grants to Organizations – 1999*, at 10, 13, 16, 20 (hereinafter "1999 Guidelines").

[11] *Department of the Interior and Related Agencies Appropriations Act, 1995*, Hearings on H.R. 4602, Pub. L. No. 103-332, 108 Stat. 2499, Before the Subcomm. on Interior and Related Agencies of the House Comm. on Appropriations, 103d Cong, 2d Sess. 297 (Apr. 20, 1994)(testimony of NEA Chairperson Jane Alexander).

[12] Respondents alleged that the Chairperson vetoed the recommended grants not on artistic merit grounds, but because of the controversial

(continued...)

"decency and respect" clause, plaintiffs amended their lawsuit to challenge the clause because of its chilling effect on their work. They were joined by NAAO, which sued on its own behalf and as representative of its member artists and arts institutions.

On June 9, 1992, the district court declared 20 U.S.C. §954(d)(1) facially unconstitutional in two respects.[13] First, it found the statute to be impermissibly vague, noting that "the very nature of our pluralistic society is that there are an infinite number of values and beliefs, and correlatively, there may be no national 'general standards of decency.'" Pet.App. 77a.

Second, the court held that the statute violated the First Amendment by "seek[ing] to suppress speech that is offensive to some in society." Pet.App. 87a. It analogized public funding of the arts to public funding of universities, following this Court's admonition in *Rust v. Sullivan*, 500 U.S. 173, 199-200 (1991), that the government must respect First Amendment constraints in such "traditional spheres of free expression." Pet.App. 82a. Relying on Congress's own findings in establishing the NEA, the court found that the arts play a central role in democratic discourse similar to the academy, and that a public arts funding program should be governed by principles similar to those governing public

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[12] (...continued)
political ideas contained in the artists' work, which addressed such issues as homosexuality, AIDS, and violence against women. After the district court rejected the government's motion to dismiss and discovery was completed, the NEA agreed to settle the claims, paying plaintiffs the amounts of the vetoed grants, damages, and attorneys' fees. Stipulation and Settlement Agreement, filed June 9, 1993.

[13] As an initial matter, the court rejected defendants' arguments that the constitutional issue could be avoided by construing the statute to require only the appointment of diverse panels, finding it contrary to the statute's plain language. Pet.App. 74a-76a.

universities: funding may be allocated based on judgments of artistic or academic merit but not on extraneous, ideological criteria such as "decency and respect." Pet.App. 85a-87a.

A panel of the Court of Appeals for the Ninth Circuit affirmed the district court's ruling on November 5, 1996.[14] The court held that "decency and respect" provides "no 'ascertainable standard for inclusion and exclusion,'" and "gives rise to the danger of arbitrary and discriminatory application." Pet.App. 17a-18a (quoting *Smith v. Goguen*, 415 U.S. 566, 578 (1974)). The court rejected Judge Kleinfeld's position in dissent that selective government benefit programs are exempt from constitutional scrutiny, reasoning that "'the scarcity of a government benefit does not render it immune from constitutional limitations.'" Pet.App. 5a n.4 (quoting *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 835 (1995)).

The court of appeals also held that the "decency and respect" requirement was unconstitutionally viewpoint-based. Guided by *Rust* and *Rosenberger*, the court identified "two related contexts in which the government may subsidize speech only if it does so in a way that is viewpoint-neutral": the first is what *Rust* characterized as "traditional sphere[s] of free expression"; the second is what *Rosenberger* described as programs designed to "encourage a diversity of views from private speakers." Pet.App. 22a. Both rationales, the court of appeals held, require that NEA funding be viewpoint-neutral. The arts, "no less than the university, are 'at the core of a democratic society's cultural and political vitality.'" Pet.App. 22a. And the NEA is

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[14] Like the district court, the court of appeals first found that the "NEA has failed to present a narrowing construction that is consistent with the language and purpose of the statute, and 'we will not rewrite a . . . law to conform it to constitutional requirements.'" Pet.App. 12a.

designed to support private speech, not to transmit government messages. Pet.App. 22a-24a.

Judge Kleinfeld dissented. Proposing a "prize" exception to this Court's First Amendment doctrine governing support of private speech, he reasoned that because NEA grants are selectively awarded "prizes" rather than generally available "entitlements," Congress may constitutionally impose both content- and viewpoint-based criteria and need not satisfy any vagueness scrutiny. Pet.App. 29a, 38a.

The court of appeals denied the government's petition for rehearing on May 1, 1997. Pet.App. 91a. Judges O'Scannlain, Kozinski, and Kleinfeld dissented, essentially for the reasons that Judge Kleinfeld had initially articulated. *Id.* at 92a-95a.

SUMMARY OF ARGUMENT

For its first 25 years of existence, the National Endowment for the Arts (NEA) judged arts funding applications on the basis of artistic merit, just as public universities make hiring, tenure, and admissions decisions based on academic merit. In 1990, Congress required the NEA for the first time to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public" in judging grant applications. 20 U.S.C. §954(d)(1). This legislative change was enacted in direct response to the NEA's support of artworks whose religious or homosexual views Congress deemed offensive to American "beliefs and values." In order to discourage funding of such art, the statute directs a federal agency whose founding purposes are to further artistic excellence and freedom of expression to interpose what the Act's author described as "a shell, a screen, a viewpoint" on judgments of artistic merit.

As both lower courts correctly concluded, §954(d)(1) violates two of the most basic tenets of the First Amendment: (1) that government may not discriminate against private speech simply because some members of the public are offended by its message; and (2) that government regulations affecting speech must be drawn with clarity to avoid creating a license to censor and a chilling effect on freedom of expression.

I. The government's strained attempt to avoid the constitutional issue through statutory construction fails on its own terms. The government has acknowledged that the statute is "indeterminate" and affords the Chairperson unfettered discretion. It also concedes that "decency and respect" must be considered in the application review process. Thus, even accepting the government's construction, the statute requires consideration of "decency and respect," and gives a government official unfettered discretion in doing so. Far from solving the constitutional problems, the government's reading only highlights them. Moreover, the government's proposal that it might implement §954(d)(1) merely by appointing diverse panels is contrary to the statute's plain language, its legislative history, and the NEA's own implementation.

II. The "decency and respect" clause directs the agency to favor applicants whose perspectives are "respectful" of American values and "decent," and to disfavor those whose views are deemed "disrespectful" or "indecent." That is the essence of viewpoint discrimination. Characterizing it as an effort to boost "public confidence" in the NEA is simply an effort to put a positive spin on the illegitimate aim of disfavoring and suppressing dangerous ideas. It echoes the effort in the 1950's to boost "public confidence" in state universities by dismissing scholars whose views were considered "un-American."

The fact that this discrimination occurs in a funding program does not alter the result. As this Court recently

reaffirmed, "ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts." *Rosenberger*, 515 U.S. at 830. Viewpoint neutrality is especially critical where (1) the government does not seek to transmit a governmental message, but to support private speech; and (2) the government funds speech in a "traditional sphere of free expression" central to a robust public debate. *Rosenberger*, 515 U.S. at 834; *Rust v. Sullivan*, 500 U.S. 173, 199-200 (1991). The government conceded below that the NEA is not a "government speech" program, but a mechanism for supporting private expression. And it does not dispute the lower courts' conclusion that the arts are a "traditional sphere of free expression."

Of course, the NEA may make certain content-based decisions. Arts funding may be allocated based on artistic merit, just as public university resources may be allocated according to academic merit. But when government seeks to legislate politically correct or "respectful" art, it has violated the First Amendment, just as it would if it sought to legislate political correctness in a public university.

The government argues that public funding of the arts falls somewhere between "government speech" and a program designed to support private expression, and purports to propose an intermediate standard. But the standard it advocates -- mere rationality -- is indistinguishable from that applied to "government speech" in *Rust*. Moreover, none of the government's arguments for distinguishing *Rosenberger* is persuasive. Like the NEA, the University of Virginia's student funding program was a selective one; in any event, selectivity does not justify viewpoint discrimination in supporting private speech. The fact that art is sometimes ambiguous only *increases* constitutional concerns, for artists will be compelled to leave an even wider berth around the statute's proscribed viewpoints, lest their open-ended messages be misconstrued.

The government claims that the NEA's influence on the art world is *de minimis* (contradicting the NEA's own claims in other fora), but never explains why the Court should ignore its many precedents that presume chilling effect where laws discriminate against disfavored ideas. And while it is correct that the statute does not explicitly prohibit funding of "indecent" or "disrespectful" art, and "only" mandates that those factors be adversely considered, that distinction is of no constitutional significance. Surely the University of Virginia could not resurrect its "religious activities" criterion by making it a negative factor in deciding who should receive student activity funds.

III. The "decency and respect" clause is also hopelessly vague. It assigns NEA officials the impossible task of identifying the "beliefs and values of the American public" and "general standards of decency," and then applying them to arts proposals. The government does not even try to explain what "decency and respect" mean. Instead, it asserts that public programs funding private speech should be immune from vagueness scrutiny, and that "decency and respect" are no more vague than artistic merit itself. This Court, however, has repeatedly applied vagueness scrutiny to regulations governing the allocation of benefits to speech, and for good reason: unbridled discretion to favor some private speech over others raises the same specter of discrimination and chilling effect as does discretion to punish. And unlike "decency and respect," artistic merit, like academic merit, has gained a common core of meaning through long application by professionals in the field.

IV. Finally, the "decency and respect" provision is an unconstitutional condition because it penalizes artists' speech beyond the federal program. The NEA bases its judgments in part on an applicant's prior body of work, so "decency and respect" apply not only to NEA-funded work, but to the applicant's entire portfolio. Applicants must accordingly

restrict the content of art they create or produce with their own funds and on their own time.

ARGUMENT

I. THE CONSTITUTIONAL ISSUES CANNOT BE AVOIDED BY STATUTORY CONSTRUCTION

The government's strained effort to avoid a constitutional issue by statutory construction fails for two reasons. First, the government's interpretation, even if accepted at face value, actually exacerbates the constitutional problems presented. And second, the government's suggestion for how the statute might be constitutionally implemented runs directly counter to the statute's plain language, its legislative history, and the NEA's own implementation of the statute.

A. The Government's Interpretation, Even If Accepted, Would Not Avoid The Constitutional Issue

The government argues that the Chairperson could implement the "decency and respect" clause by appointing diverse peer review panels to judge grant applications, and implies that the panels themselves need not consider "decency and respect." Pet.Br. 21-25.[15] But this is not in fact a narrowing construction, and does not obviate the need to address the constitutional issues. The government reads the statute to afford the Chairperson wide discretion in

[15] Significantly, the government nevers states that the Chairperson could *prohibit* peer review panels from considering "decency and respect." Thus, its proposal would not take "decency and respect" criteria out of the application review process.

deciding how to ensure that "decency and respect" are considered. Pet.Br. 22. In the court of appeals, the government was even more candid: it described the statute as "indeterminate," and conceded that "there is no way to predict what the Chairperson's new manner of implementing the statute would be." NEA C.A. Br. 31, 39. It said the Chairperson could do everything from "tak[ing] no action whatsoever," *id.* at 18, to applying "decency" criteria only to applications "for projects whose intended audience is children under twelve years of age," *id.* at 32, to "leav[ing] the decision about what standards of decency to apply to the 'individual [peer review panel members'] personal views of decency or some ephemeral 'general American standards of decency.'" *Id.* at 32.

In light of its view of the statute, the government does not suggest that the "construction" it now offers is *required* by any reasonable statutory interpretation. It simply maintains that the statute *permits* the Chairperson to implement it through the selection of diverse panels. But under the government's construction, the Chairperson could also adopt virtually any other method of "taking into consideration general standards of decency and respect" that he or she chooses. As both lower courts held, a statute that allows the Chairperson unfettered discretion in regulating speech is inherently vague, and cannot be saved by a narrowing construction. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988)(statutes affording government officials unfettered discretion over speech "engender identifiable risks to free expression that can be effectively alleviated only through a facial challenge").

In addition, the government concedes that one thing about the statute is clear: the NEA "must ensure that ['decency and respect'] are 'tak[en] into consideration' in . . . the application review process." Pet.Br. 17. That well-warranted concession is also fatal to the government's contention that the constitutional issues can be avoided. As

long as "decency and respect" must be considered in the process by someone, applicants will be compelled to tailor their work to avoid contravening the criteria. Thus, even accepting the government's reading of the statute, the statute's chilling effect remains, and its constitutionality must be decided.[16]

B. The Government's Interpretation Of The "Decency And Respect" Clause Is Contrary To The Statute's Plain Language, The Intent of Congress, And The NEA's Own Implementation

The government's claim that the NEA can implement the "decency and respect" clause simply by appointing diverse review panels also defies basic principles of statutory construction. First, it ignores the law's plain language, which directs the Chair to establish regulations and procedures that "ensure that: (1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public." As the court of appeals noted, this language explicitly requires that "standards of decency and

[16] The government raises a straw man in repeatedly objecting that the statute should not be read to make "decency and respect" a "categorical requirement" for funding. Pet.Br. 17, 21. As demonstrated below, whether the criteria are absolute bars or merely negative factors does not affect their constitutionality. *See* Section II.D.4, *infra*. In any event, there is clear language in both lower court opinions that is simply irreconcilable with the government's view. Pet.App. 8a ("these clauses instruct the Chairperson to ensure that standards of decency and respct for diverse values are considered when judging the artistic merit and excellence of an application."); *id.* at 75a ("it is clear from the language of the statute that 'decency' and 'respect' for diverse beliefs *are* factors to be considered").

respect for diverse values are considered when judging the artistic merit and excellence of an application." Pet.App. 8a. When a statute's terms are unambiguous, "judicial inquiry should be complete except in rare and exceptional circumstances." *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 873 (1991). The Court "'cannot press statutory construction "to the point of disingenuous evasion" even to avoid a constitutional question.'" *Seminole Tribe of Florida v. Florida*, __ U.S. __, 116 S.Ct. 1114, 1124 n.9 (1996)(quoting *United States v. Locke*, 471 U.S. 84, 96 (1985), and *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933)(Cardozo, J.)).[17]

Second, the government's proposed reading renders the "decency and respect" clause redundant of 20 U.S.C. §959(c), passed at the same time, which independently requires the appointment to peer review panels of "individuals reflecting a wide geographic, ethnic, and minority representation as well as individuals reflecting diverse artistic and cultural points of view." Statutory interpretations that "'render superfluous other provisions in the same enactment'" are not generally countenanced. *Freytag*, 501 U.S. at 877 (quoting *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990)).[18]

[17] As its own selective emphases illustrate in its quotation of the statute, Pet.Br. 21-22, the government asks the Court to read the statute as if "taking into consideration general standards of decency" modified not "the criteria by which applications are to be judged," the clause it immediately follows in §954(d)(1), but the Chairperson's general obligation to develop regulations and procedures. Had Congress intended such a strange result, the "decency and respect" clause would not be in subsection (1), which sets forth the criteria for judging arts applications, but in the overarching language of §954(d), which directs the Chairperson to establish regulations and procedures. In short, the government asks the Court to rewrite the statute, not interpret it.

[18] The government asserts that the agency went beyond what §959(c)

(continued...)

Third, the government's interpretation flies in the face of the clause's legislative history, which makes crystal clear that "decency and respect" were to be "tak[en] into consideration" *in judging applications*. Representative Henry, author of the clause, described it as placing "new language now in the grant procedure itself . . . [which] mandates that in the awarding of funds, in the award process itself, general standards of decency must be accorded." 136 Cong.Rec. 28672 (1990). And he reiterated that it identified "a viewpoint that must constantly be taken into account." *Id.* at 28631.

Finally, the government's proffered interpretation is contradicted by its own implementation. As the court of appeals observed, in the period before the law was enjoined, the agency and the National Council:

> did not question their obligation under §954(d)(1) to judge grant applications according to "general standards of decency and respect for the diverse beliefs and values of the American public." Instead, to satisfy this new obligation, NEA officials adopted the approach of having the Chairperson instruct advisory panel members to bring their own definitions of these terms "to the table" and make them "part of the deliberative process."

Pet.App. 11a-12a (quoting Minutes of the December 1990 Retreat of the National Council on the Arts at 21)(now at J.A. 12-13). *See* pp.6-7, *supra*.[19]

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[18] (...continued)
"otherwise requires," Pet.Br. 24 n.6, relying on the Declaration of Randolph McAusland (J.A. 79-83). But McAusland merely states that the appointment of diverse panels was "[c]onsistent with" §959(c). J.A. 79, ¶3.

[19] The government's reliance on *Chevron U.S.A. v. Natural Resources* (continued...)

II. THE "DECENCY AND RESPECT" CLAUSE VIOLATES THE FIRST AMENDMENT BY IMPOSING VIEWPOINT-BASED CRITERIA ON A GOVERNMENT PROGRAM DESIGNED TO SUPPORT PRIVATE ARTISTIC EXPRESSION

The "decency and respect" clause expressly disfavors private speech that fails to "respect" the American public's "beliefs and values" or offends its "standards of decency." Under this staute, the depiction of a nude will be disadvantaged if its perspective is deemed "indecent" or "disrespectful," and advantaged if its perspective is "decent" and "respectful." The law discriminates among speakers based not on their subject matter, but their viewpoint. And it discriminates against the very speech the First Amendment protects most -- the controversial and the unpopular.

Such viewpoint discrimination is presumptively unconstitutional. Even where the government is subsidizing rather than penalizing speech, it may not "favor some viewpoints or ideas at the expense of others." *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508

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[19] (...continued)
Defense Council, 467 U.S. 837 (1984), is misplaced. *Chevron* held that if a statute is "silent or ambiguous" with respect to a particular question of interpretation, the relevant agency's construction, if reasonable, should govern. *Id.* at 843-44. Here, the "decency and respect" clause is neither silent nor ambiguous as to whether "decency and respect" should be considered. *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991)("administrative interpretation of a statute contrary to language as plain as we find here is not entitled to deference"). In addition, "deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 213 (1988); *see also Smiley v. Citibank (South Dakota) N.A.*, __ U.S. __, 116 S.Ct. 1730, 1733 (1996).

U.S. 384, 394 (1993)(quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)).[20] As the court of appeals correctly held, this mandate applies with particular force in two settings: (1) where the government program is designed to "encourage a diversity of views from private speakers," *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. at 833; and (2) where the government funds speech in "traditional sphere[s] of free expression so fundamental to the functioning of our society," such as public universities. *Rust v. Sullivan*, 500 U.S. at 199-200. The NEA falls squarely within both categories.

The *only* setting in which this Court has permitted the government to dictate viewpoint in funding speech is where the government itself "is the speaker or . . . enlists private entities to convey its own message." *Rosenberger*, 515 U.S. at 833 (citing *Rust*, 500 U.S. at 199). The government conceded below that NEA funding is not designed to transmit a government message, but to support diverse private expression. Yet the standard the government proposes to apply here -- mere rationality -- is indistinguishable from that applied to government speech in *Rust*. As we will show, none of the government's reasons for distinguishing the NEA from settings where viewpoint neutrality is required is persuasive.

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[20] *See also Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)("the goverment violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject"); *Regan v. Taxation With Representation*, 461 U.S. 540, 548 (1983)(selective allocation of subsidies may not "'ai[m] at the suppression of dangerous ideas'")(quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959)).

A. The "Decency And Respect" Clause Discriminates On The Basis Of Viewpoint

The "decency and respect" clause, which turns on whether one shows *respect* or *disrespect* toward the American public's "beliefs and values," is a paradigmatic example of viewpoint discrimination. The statute does not proscribe a particular subject, but particular points of view. As the government concedes, a statute that prohibited funding of art that "denigrates religious beliefs" would be unconstitutionally viewpoint-based. Pet.Br. 36 n.11.[21] Because the "decency and respect" clause is equally aimed at "suppressing dangerous ideas," it too is viewpoint-based and invalid.

This Court has carefully distinguished viewpoint discrimination from subject matter prohibitions in government funding of private speech: the government may generally decline to fund an entire subject, but when it refuses to fund particular *perspectives* on that subject, it engages in viewpoint discrimination. In *Rosenberger*, for example, the Court held that a ban on funding of all religious expression was viewpoint-based because "the University d[id] not exclude religion as a subject matter but select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints . . . . The prohibited perspective, not the general subject matter, resulted in the refusal to [fund]." 515 U.S. at 831. Similarly, the "decency and respect" clause does not describe a prohibited subject matter, but discriminates against those treatments of

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[21] *See also* Letter of Assistant Attorney General Andrew Fois to Honorable Sidney R. Yates, Oct. 5, 1995 (setting forth views of the Office of Legal Counsel)(separately lodged with the Court).

otherwise includible subjects that an NEA official deems "disrespectful" or "indecent."[22]

The legislative history confirms the statute's viewpoint bias. The provision's author described it as establishing "a viewpoint that must be constantly taken into account," 136 Cong.Rec. 28631 (1990)(remarks of Cong. Henry), and promised that it would prevent the funding of art that offended the public's values, specifically citing Andres Serrano's *Piss Christ*. *Id.* at 28661. And the bill's co-sponsor promised that the clause would ensure that "works which deeply offend the sensibilities of significant portions of the public . . . not . . . be supported with public funds." *Id.* at 28624.[23]

The government argues that "general standards of decency" is nonetheless viewpoint-neutral because it limits only the "mode or form" of expression. Pet.Br. 39-41. This novel interpretation finds no support in the statute's language, was never advanced in the lower courts, and is contrary to the NEA's own implementation of the statute. Even if the statute actually drew such a distinction, it would be specious as a constitutional matter and unintelligible as an artistic standard. As Justice Kennedy recently observed,

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[22] The fact that the clause refers to the American public's "diverse" beliefs and values does not, of course, render it viewpoint-neutral. Whatever those values are, only "disrespect" is adversely considered. Moreover, as this Court noted in *Rosenberger*, the concept of viewpoint discrimination is not narrow and "bipolar"; where "multiple voices are silenced," the "debate is skewed in multiple ways." 515 U.S. at 831-32. *Amicus curiae* Morality in Media's argument that the "respect" clause should be saved from vagueness by "narrowly" interpreting it to mean "blasphemy" only highlights the law's viewpoint discrimination.

[23] In light of this clearly stated purpose, the government's suggestion that the "respect" prong was an effort to encourage the NEA to broaden the scope of artistic expression it funded is ludicrous. Pet.Br. 42-43. The last thing the 1990 Congress was interested in was *broadening* the scope of NEA funding.

"[i]n artistic or political settings, indecency may have strong communicative content, protesting conventional norms or giving an edge to a work by conveying 'otherwise inexpressible emotions' . . . Indecency often is inseparable from the ideas and viewpoints conveyed, or separable only with loss of truth or expressive power." *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, __ U.S. __, 116 S.Ct. 2374, 2415-16 (1996)(Kennedy, J., concurring). As the poet Wallace Stevens put it, "the style of a poem and the poem itself are one." Wallace Stevens, *Two or Three Ideas*, in OPUS POSTHUMOUS 257 (Milton J. Bates ed. 1989).[24] Picasso's *Guernica* would not have the same anti-war message if its imagery were less jagged, violent, and shocking. Aristophanes's *Lysistrata*, Chaucer's *Canterbury Tales*, or Shakespeare's comedies would not convey their respective messages without the puns, wordplay, and other stylistic choices that their authors made. *Cf. Cohen v. California*, 403 U.S. 15, 26 (1971)("we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process").[25]

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[24] *See also* Richard Weisberg, POETHICS AND OTHER STRATEGIES OF LAW AND LITERATURE 4 (1992)("As Cardozo noted years ago, and as every poet and storyteller understands, the carefully crafted utterance . . . unites the message with the medium -- indeed, is so constituted that the medium of linguistic expression is the meaning"); Cleanth Brooks, THE WELL WROUGHT URN 176, 183 (1947)(criticizing as "the heresy of paraphrase" the notion that an artwork's style can be separated from its meaning).

[25] The government seeks support in this Court's cases addressing "decency" restrictions in the broadcast media and public schools. But both are expressly limited to their settings, and were predicated on the fact that children were involved. Restrictions on vulgarity are permissible in public elementary and high schools because they are part of the government's legitimate inculcative function in that setting.

(continued...)

Citing language adopted at the same time Congress enacted the "decency and respect" clause, the government seeks to neutralize the clause's discriminatory terms by characterizing them as aimed not at suppressing controversial ideas, but at maintaining "public confidence" in the arts, and being "sensitive to the nature of public sponsorship." Pet.Br. 7, 39, 44. But as former NEA General Counsel Amy Sabrin candidly acknowledged, the latter terms are merely "coded language meaning, 'don't do anything too controversial.'"[26] The government's "public confidence" argument would justify refusing to fund controversial speech in any public program, for by definition supporting the expression of unpopular ideas will undermine public support. For example, Congressman Biaggi made just this argument in proposing to ban NEA funding of work that denigrates a minority group, a standard this Court recognized as viewpoint discrimination in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-92 (1992).[27] On this "public confidence" theory, a state legislature could prohibit public universities from employing "subversive" professors, and the University of Virginia could have defended its exclusion of religious activities on the ground that such activities might undermine public support. *But cf. Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Rosenberger*, 515 U.S. 819.

The "public confidence" justification would swallow the First Amendment, for it is nothing more than a positive "spin" on the prohibited goal of suppressing dangerous ideas. Such rationales are presumptively suspect, because "speech may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). Protecting people from offense does not justify viewpoint discrimination.[28] This is as true where the government is funding private speech as elsewhere. "Virtually every congressional appropriation will to some extent involve a

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[25] (...continued)
Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986). And as this Court noted only last term, the holding in *FCC v. Pacifica Foundation, Inc.*, 438 U.S. 726 (1978), was "emphatically narrow," *Reno v. ACLU*, __ U.S. __, __, 117 S.Ct. 2329, 2343 (1997), and was limited to the particularly invasive and child-accessible broadcast medium. The government cites *dicta* in the *Pacifica* plurality opinion to the effect that the FCC's regulation would limit only the mode of expression, and not the ideas expressed, 438 U.S. at 743 n.18, but the majority did not join that part of the opinion, and in any event the plurality did not suggest it was drawing such a distinction for all First Amendment purposes, which would have required overruling *Cohen v. California*. *See Reno v. ACLU*, 117 S.Ct. at 2344-48 (invalidating restriction on "indecency" on Internet, and distinguishing *Pacifica*).

[26] Amy Sabrin, "Thinking About Content: Can It Play An Appropriate Role in Government Funding of the Arts?", 102 Yale L.J. 1209, 1222-23 (1993). Ms. Sabrin wrote the article after leaving the NEA, and her views did not express the NEA's official position.

[27] *See* p.4, *supra*. Biaggi argued: "The point is there should be a sensitivity . . . . I think it's incumbent upon [the NEA] to be aware of it, in making grants, that you should sensitize the people that are receiving them. Let them know that there's a feeling out there that large groups of people don't like being offended." 1984 Grantmaking Hearing, *supra* note 1 at 3.

[28] *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 118 (1991)("if it is the speaker's opinion that gives ofense, that consequence is a reason for according it constitutional protection"); *Texas v. Johnson*, 491 U.S. 397, 414 (1989)("if there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); *United States v. Eichman*, 496 U.S. 310, 318 (1990)("any suggestion that the Government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment").

use of public money as to which some taxpayers may object . . . . [But] this interest [cannot] be invoked to justify a congressional decision to suppress speech." *FCC v. League of Women Voters*, 468 U.S. 364, 385 n.16 (1984). The "public confidence" rationale turns on its head the Court's teaching that "regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a 'law abridging the freedom of speech.'" *Id.* at 383-84.

B. The First Amendment Requires Viewpoint Neutrality Where, As Here, A Government Program Funds A Diverse Range Of Private Expression

No one disputes that had Congress prohibited artists directly from creating art that fails to conform to the "decency and respect" clause, the statute would be unconstitutional. The question is whether the fact that the restrictions operate as conditions on the support of private speech should alter the result. Plaintiffs maintain that it should not, just as it did not in *Rosenberger* and *Lamb's Chapel*. Those cases hold that where government is supporting private speech, it "may not favor some viewpoints or ideas at the expense of others." *Lamb's Chapel*, 508 U.S. at 394.

In *Rosenberger*, a student group challenged the University of Virginia's refusal to subsidize a religious magazine through its Student Activities Fund. Invoking *Rust v. Sullivan*, 500 U.S. 173, the University argued that it was merely declining to subsidize speech, not penalizing it directly, and therefore could discriminate against religious expression. This Court rejected that argument, and explained that *Rust* applies only where "the State is the speaker" or "disburses public funds to private entities to

convey a governmental message." *Rosenberger*, 515 U.S. at 833. Where the government "instead expends funds to encourage a diversity of views from private speakers," the Court held, viewpoint discrimination is forbidden. *Id.* at 834.

The critical distinction is between *government speech* programs, and programs designed to support a diverse range of *private speech*. Thus, the government could constitutionally require artists hired for a "Say No to Drugs" poster campaign to express that particular message in work created for the campaign, just as in *Rust* it could require the Title X family planning counsellors to express a pro-childbirth message. But it could not refuse to fund student magazines, which spoke not for the university but for the students themselves, on the basis of their religious viewpoint. *Rosenberger*, 515 U.S. at 834.

In the court of appeals, the government conceded that the NEA was not a government speech program. In a supplemental brief specifically directed to the consequences of *Rosenberger*, the government admitted that "the artistic expression funded by an NEA grant is not the government's own speech; the NEA's award of the grant does not constitute government approval of a particular message or point of view that may be communicated by the work of art; and public funds support a diversity of projects and productions within the overall arts program." NEA C.A. Supp. Br. at 3-4.[29] That concession controls here.[30]

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[29] *See also* Letter of Ass't Atty. Gen. Andrew Fois, *supra* n.21, at 2 ("the government's purpose in making NEA grants appears to be less to 'convey a governmental message' than to 'facilitate the speech of private persons' as understood in *Rosenberger*").

[30] The government seeks to evade *Rosenberger* by mischaracterizing the distinction the Court drew. The *Rosenberger* Court distinguished between government speech programs and programs designed to support

(continued...)

C. Viewpoint Neutrality Is Required In Government Funding Of The Arts Because The Arts, Like The Academy, Is A "Traditional Sphere Of Free Expression"

As both lower courts reasoned, the result here is also mandated by this Court's admonition in *Rust v. Sullivan* that government funding is not "sufficient to justify government control over the content of expression" in "traditional sphere[s] of free expression . . . fundamental to the functioning of our society." *Rust*, 500 U.S. at 199-200. Such "[t]raditional sphere[s] of free expression" include, for example, the public university, the press, and the public forum.[31] If government could control the content of private speech in these settings simply because it subsidizes the speakers or the speech, our "uninhibited, robust, and wide-open" public debate would be gravely threatened.

The government does not take issue with the lower courts' findings that artistic expression, no less than academic speech, journalism, or a soapbox address, is at the

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[30] (...continued)
a diversity of private speech. The government restates the distinction as one between government speech and "'for[a]' to encourage a dialogue on matters of public concern." Pet.Br. 28-29. But the *Rosenberger* viewpoint-discrimination principle is not limited to public fora or dialogues on matters of public concern. Even in nonpublic fora, where by definition the government has *not* opened public property for speech purposes, the First Amendment prohibits viewpoint discrimination. *Cornelius*, 473 U.S. at 806. And except in the special circumstances of public employment, the First Amendment imposes no threshold requirement that speech be on "matters of public concern" before it is protected against viewpoint discrimination.

[31] *Rust*, 500 U.S. at 199-200 (citing *Keyishian v. Board of Regents*, 385 U.S. at 603, 605-06; *Arkansas Writers Project, Inc. v. Ragland*, 481 U.S. 221 (1987)); *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946)(postal subsidies may not be denied because magazine deemed "indecent").

core of a democratic society's cultural and political vitality. Pet.App. 80a-85a, 22a-23a. Congress recognized as much in creating the NEA. 20 U.S.C. §951(4)("democracy demands wisdom and vision in its citizens and . . . must therefore foster and support . . . access to the arts and the humanities"). The Senate Report confirms that the arts "'are at the center of our lives and are of prime importance to the Nation and to ourselves.'" S. Rep. No. 300, *supra*, at 7. Like universities and the press, art plays a critical checking function, providing alternative perspectives on the world and often challenging the status quo. This is why artists, along with universities and the press, are often the first targets of repressive regimes.[32]

A requirement of viewpoint neutrality is compatible with the NEA's function, just as it is compatible with the function of public universities, public forums, and the press. "A sense of freedom is . . . necessary for creative work in the arts." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957)(Frankfurter, J., concurring). For precisely this reason, the NEA's enabling statute limits government control and guarantees "a climate encouraging freedom of thought, imagination, and inquiry." 20 U.S.C. §951(5) (1965). As Congress recognized, the NEA's function is not

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[32] *See generally* Moshe Carmilly-Weinberger, FEAR OF ART: CENSORSHIP AND FREEDOM OF EXPRESSION IN ART (1986); Stephanie Barron, ed., "DEGENERATE ART": THE FATE OF THE AVANT-GARDE IN NAZI GERMANY (1991)(catalogue from art exhibit examining Nazi Germany's condemnation of modern art). Moreover, repressive regimes often exercise control over art through selective allocation of funding. Liang Heng & Judith Shapiro, "Intellectual Freedom in China After Mao, With a Focus on 1983," at 79-86 (Fund for Free Expression Report 1984)(discussing China's use of subsidies through artistic associations to control artistic expression); Miklos Haraszti, THE VELVET PRISON: ARTISTS UNDER STATE SOCIALISM 7-8 (Katalin & Stephen Landesmann trans., 1987)(Communist Hungary exercised control over its artists through selective allocation of state subsidies).

only compatible with First Amendment principles of neutrality; its healthy functioning *demands* such neutrality.[33]

This is not to say, of course, that the NEA must be blind to content. Rather, the principles that govern NEA funding are akin to those that govern public universities. The Endowment may decide to fund sculpture rather than poetry, just as a university may decide to teach agriculture rather than astrophysics. And Endowment officials -- experts in the arts -- must review content to assess an applicant's artistic merit, just as a public university must consider the content of faculty and student work to assess its academic merit. But as the district court found, a public arts program requires artistic freedom in the same sense and for the same reasons that a public university requires academic freedom.[34] Just as it would violate the First Amendment for a state legislature to require tenure committees to disfavor scholarship that espouses views

[33] The NEA itself has recognized the necessity for neutrality. The Endowment's "Statement of Mission" declares that "it must not, under any circumstances, impose a single aesthetic standard or attempt to direct artistic content." *1992 Guidelines*, *supra* n.10, at 52. The 1990 amendments that gave rise to this litigation did not alter the underlying tenets of the NEA, namely to support excellent private art. Instead, Congress sought to superimpose on the NEA's judgments of "artistic merit and excellence" a screen to disfavor views deemed offensive to American "beliefs and values."

[34] The relation between academic and artistic freedom is more than an analogy; the two are inextricably interrelated. One of art's principal places of creation and study is the university; universities support museums, theater and film programs, publishing houses, and concerts. Pet.App. 84a. The principal national academic organizations have themselves recognized the importance of this link. *See* Pet.App. 85a (quoting 1990 Wolf Trap Conference Statement from leading academic associations on necessity for artistic freedom); Brief *Amicus Curiae* of AAUP, *et al.*

contrary to "American beliefs and values," so it violates the First Amendment to require the NEA to disfavor "indecent" or "disrespectful" artistic expression. Pet.App. 84a-85a.[35]

D. The Government's Approach Would Render Viewpoint-Discriminatory Selective Subsidies Self-Justifying

In an attempt to avoid the clear dictates of *Rosenberger* and *Rust*, the government argues that the NEA program falls somewhere *between* a government speech program and a program designed to support a diverse range of private expression. Pet.Br. 37. In this newly discovered "middle ground," the government maintains, the Court should uphold any criteria that Congress "rationally concludes, within the confines of the First Amendment, take into account the public interest." *Id.* But this "rational basis" standard is no different from the deferential scrutiny applied to government speech in *Rust v. Sullivan*.[36] The government's "middle ground" is an illusion.

[35] The government notes that it often allocates awards and prizes for expression, implying that applying First Amendment standards to such settings would somehow be unmanageable. Pet.Br. 49 n.22. In fact, government funding in "traditional spheres of free expression," such as scholarship, research, and the humanities, is generally allocated on standards of academic merit consistent with viewpoint neutrality. *See, e.g.*, 20 U.S.C. §956(c)(criteria for National Endowment for the Humanities); *see also* statutes cited at Pet.Br. 49 n.22. On the government's view, Congress would be free to require all of these programs to disfavor applicants who had expressed ideas that might offend the American public's "beliefs and values."

[36] Indeed, this standard may be entirely toothless. Arguably everything Congress does "takes into account the public interest." It would thus be difficult for an unelected federal court to second-guess Congress on whether the "public interest" was taken into account.

Moreover, the government makes no affirmative case for why the Court should identify a "middle ground." Instead, it merely advances four reasons for distinguishing *Rosenberger*, none of which is persuasive, and none of which is supported by precedent. The government is plainly sailing uncharted waters, and has provided the Court with no reason to depart from the clear guidance of its own precedents.

1. The NEA's Selectivity Does Not Justify Viewpoint Discrimination

The government argues first that the NEA program is materially different from the student activities program in *Rosenberger* because it is "highly selective." According to the government, this selectivity itself "gives rise to a distinctive 'communicative element inherent in the very act of funding itself,' namely that in the government's judgment, the project or work has artistic excellence and merit." Pet.Br. 35.

This argument cannot be squared with *Rosenberger*. The student activities program was also selective: of 135 applicants who applied for funding, 118 were funded and 17 rejected. 515 U.S. at 825. And the University's criteria could equally be said to give rise to a "distinctive communicative element" -- it supported only activities "related to the educational purpose of the University." *Id.* at 824. The government characterizes the NEA as "highly selective," Pet.Br. 33; in fact, the NEA has historically funded 60% of all applications from organizations, which are virtually the only funding recipients today; even after last year's budget cuts, the ratio is about 35%.[37] There is

[37] *See* n.4, *supra*. When individual and organizational applicants are considered together, the grant to application ratio is about two of seven. *See* n.5, *supra*.

simply no principled distinction between a program that funds nine of ten applicants and one that funds three of five or two of seven. Otherwise, the University of Virginia could resurrect its "religious" exclusion simply by making its program more selective. "[T]he government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity." *Rosenberger*, 515 U.S. at 835.

The government's argument has no stopping place. Every time the government imposes a selection criterion on the allocation of a good, it will be able to argue that the act of selection contains a "distinctive communicative element." And without a principle for determining when a "selective" program becomes "highly selective," the government's argument reduces to a tautology -- the very imposition of selection criteria effectively immunizes the criteria from First Amendment review.

Even if it were somehow limited to merit-based programs in which applicants faced odds of two-in-seven or worse, the government's argument would have sweeping consequences. University teaching positions are generally more selective than two-of-seven, yet state legislatures cannot bar the employment of professors who advocate "politically incorrect" views. *Keyishian v. Board of Regents*, 385 U.S. 589; *University of Pennsylvania v. EEOC*, 493 U.S. 182, 195-99 (1990). Admission to many public universities is also more competitive than receipt of an NEA grant, yet the First Amendment would not permit the legislature to impose ideological criteria on the admissions process. *Cf. Sweezy v. New Hampshire*, 354 U.S. at 250; *id.* at 263 (Frankfurter, J., concurring). In short, the act of choosing which private speakers to fund, even where "highly selective," does not justify viewpoint discrimination.

2. Art Is Entitled To No Less Protection Against Viewpoint Discrimination Than Other Forms Of Speech

The government also maintains that viewpoint neutrality principles ought not apply because "the nature of art" is often more ambiguous than other forms of communication. Pet.Br. 30-31. But as this Court recently recognized, if the First Amendment protected only art that conveyed a "particularized message," "constitutional protection would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 569 (1995).

The government's reliance on the sometimes ambiguous "nature of art" is especially disingenuous here, where the statute directs the NEA to disfavor art *precisely* when the agency understands it to convey a particular message -- one of disrespect for American values. It is only when a government official finds such a viewpoint that the statute's disadvantagous treatment is triggered. Whether or not art is sometimes abstract, the government's purpose in singling out art that offends "American beliefs and values" is plainly "aimed at the suppression of dangerous ideas." *Regan*, 461 U.S. at 550; *cf. Texas v. Johnson*, 491 U.S. at 414.

If anything, the ambiguity of art *increases* First Amendment concerns. Ambiguous, multilayered works are frequently censored precisely because they are misunderstood, interpreted too literally, or mistakenly reduced to simplistic messages.[38] Artists ask questions that may be misinterpreted, and often do so in provocative ways. Precisely because of the often open-ended "nature of art," the "decency and respect" clause is likely to drive both applicants and decisionmakers to "steer far wider of the unlawful zone" in the creation and judging of artistic works. Artists can only assume that irony and ambiguity will be construed against the creator.

3. The First Amendment Does Not Require An Empirical Showing That Government Regulation Has Skewed The Marketplace Of Ideas

The government also argues that the "decency and respect" clause should be upheld because the NEA funds only a small percentage of the art market, and therefore its criteria are unlikely to have a substantial chilling effect on public debate. Pet.Br. 38 n.12. This argument is flawed as an empirical and a legal matter. The government's only empirical support is a footnote in a law review article, based on a simple comparison of NEA grant funds to total nonfederal arts expenditures. *Id.* What the government neglects to mention is that the NEA exerts much broader influence over the art market than its own appropriations might indicate, because the combination of matching grants and the NEA's preeminence in the arts field means that substantial nonfederal support follows NEA support. Endowment grants generate a ten-fold match in matching funds.[39] And "despite the recent cutbacks, the Arts

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[38] *See* Wendy Steiner, THE SCANDAL OF PLEASURE 94-127 (1995)(noting that Salman Rushdie's intent in writing THE SATANIC VERSES was ambiguous and paradoxical, but those seeking to ban the (continued...)

[38] (...continued)
book were singleminded in their viewpoint-discriminatory purpose); *id.* at 117-18 (in censorship controversies, "literalism, the collapse of paradox, becomes the greatest threat").

[39] *See* note 11, *supra*; *see also Bella Lewitzky Dance Foundation v.* (continued...)

Endowment remains the largest single source of national leadership and support for the arts in America."[40] Accordingly, the government's argument that NEA funding is not very influential is directly contrary to the NEA's own claims.

More importantly, even if the empirical claim were accurate, the First Amendment does not tolerate viewpoint discrimination in small doses. The government twice concedes that "different First Amendment concerns could come into play if government funding manipulates or skews the 'marketplace of ideas' in a way that monopolizes the opportunity for free expression or effectively suppresses the communication of disfavored viewpoints." Pet.Br. 38 n.12, 47 n.21. But there is no measure for determining whether a particular government intervention has "skewed" the "marketplace of ideas" in this manner. The public debate is not susceptible to such microeconomic analysis.

The need for clear guidelines in the area of speech has led the Court to pretermit such unmanageable "effects" tests and instead to apply prophylactic rules. The prophylactic rule against viewpoint discrimination is predicated on a *presumption* that viewpoint discrimination skews the marketplace of ideas, *Simon & Schuster*, 502 U.S. at 116; *Rosenberger*, 515 U.S. at 832. This Court has never required an empirical showing that the marketplace of ideas was in fact skewed before invalidating content- or

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[39] (...continued)
Frohnmayer, 754 F.Supp. at 783 (noting NEA's "dominant and influential role in the financial affairs of the art world" and the "multiplier effect" of NEA funding); 20 U.S.C. §954(e)(requiring that NEA funding not exceed 50% of cost of project); *1999 Guidelines, supra* n.10, at 23 (describing "partnership agreements" with other arts funding agencies); *id.* at 11, 14, 17, 21 (matching grants requirements).

[40] National Endowment for the Arts, 1997 Strategic Plan, at http://arts.endow.gov/NEAText/Guide/Strategic/Intro.html.

viewpoint-based discrimination in government support of speech. *See, e.g., Rosenberger*, 515 U.S. 819; *Lamb's Chapel*, 508 U.S. 384; *Arkansas Writers Project v. Ragland*, 481 U.S. 221; *FCC v. League of Women Voters*, 468 U.S. 364; *Keyishian v. Board of Regents*, 385 U.S. 589.

4. The First Amendment Prohibits Viewpoint-Based Criteria Without Regard To Whether They Operate As Absolute Bars To Funding Or Negative Factors To Consider

Finally, the government argues that the "decency and respect" clause should be upheld because it merely prescribes factors that must be "take[n] into consideration" in judging grant applications, and not "categorical requirements" for funding. Pet.Br. 36. Again, the government offers no case support for this distinction, which is contrary to basic First Amendment principles.[41] Free speech jurisprudence is predicated on the peculiar vulnerability of speech to "chilling effects."[42] From the

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[41] The only "support" the government does offer is a misleading reference to the views of a legal task force to the Independent Commission, implying that it recommended that Congress adopt the "decency and respect" clause. Pet.Br. 44 (quoting Independent Commission, *A Report to Congress on the National Endowment for the Arts* 89 (Sept. 1990)). In fact, the task force's only formal contribution to the Commission report says precisely the opposite: "What [Congress] may not do . . . is to choose those to be funded -- and often more important, those *not to* be funded -- in a manner which punishes what Congress views as 'dangerous content.'" *Independent Comm'n Report* at 86.

[42] *Rosenberger*, 515 U.S. at 835 (noting that one of the "vital First Amendment speech principles" at stake in selective government funding is the "danger . . . to speech from the chilling of individual thought and (continued...)

standpoint of artists and institutions seeking NEA funding, it does not matter whether "decency" and "respect" are absolute bars or non-dispositive negative factors; in either event, applicants will be chilled from producing work that could run afoul of those criteria for fear of being denied funding. "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion." *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

Viewpoint discrimination does not become permissible where it is one of several factors in a decision. If defendants' theory were correct, the University of Virginia could consider a student group's "religious" perspective as a negative factor in allocating student activity funds, the Postmaster General could consider a publication's "decency" in deciding whether to allocate mailing privileges, and a jury could consider a defendant's political beliefs as one factor in deciding what penalty to assign. This is not the law, and never has been. *Dawson v. Delaware*, 503 U.S. 159, 167 (1992)(First Amendment forbids reliance on defendant's abstract beliefs in sentencing, even as one factor among many); *Attorney General v. Soto-Lopez*, 476 U.S. 898 (1986)(civil service preference for New York residents violates right to travel, even though it is only one of many factors considered in whether one gets the job); *Ozonoff v. Berzak*, 744 F.2d 224 (1st Cir. 1984)(Breyer, J.)(First Amendment violated by Executive Order governing security

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[42] (...continued)
expression"); *City of Lakewood*, 486 U.S. at 757 (stressing propriety of facial challenges in First Amendment context to avoid chilling effects on speech); *NAACP v. Button*, 371 U.S. 415, 432-33 (1963)(heightened need for clarity in statutes affecting speech because of danger that speech will be chilled).

clearances that provides that a person's political associations "may be considered" as one factor in the determination).[43]

III. THE DECENCY AND RESPECT CLAUSE IS VOID FOR VAGUENESS

As the government's silence on the subject underscores, the "decency and respect" clause cannot survive any degree of vagueness scrutiny. One would be hard-pressed to find two people in the United States who could agree on what the "diverse beliefs and values of the American public" are, much less on whether a particular work of art "respects" them. Much like the licensing scheme in *Burstyn v. Wilson*, 343 U.S. 495, 504-05 (1952), the "decency and respect" clause sets decisionmakers "adrift upon a boundless sea amid a myriad of conflicting currents of . . . views, with no charts but those provided by the most vocal and powerful orthodoxies." Similarly, what standards of decency are "general standards of decency"? To the extent they are even ascertainable, such standards probably vary by generation, culture, ethnic identity, and geographical location. "Decency" is likely to mean something very different to a septegenarian in Tuscaloosa and a teenager in Las Vegas.

Thus, the government does not dispute the court of appeals' conclusion that the "decency and respect" clause

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[43] The government's theory would also require rewriting this Court's mixed motive doctrine, which provides that if an impermissible First Amendent consideration has played a motivating role in a government decision, the decision is unconstitutional unless the government can prove that it would have reached the same result without considering the impermissible factor. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 285-87 (1977). Under the government's view, as long as the impermissible consideration was just one of several non-dispositive factors considered, there could be no constitutional violation, and there would be no basis for shifting the burden to the defendant to show that the factor in effect played no role.

specifies "'no standard of conduct . . . at all.'" Pet.App. 17a (quoting *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971)). Instead, it makes two principal arguments: (1) the void-for-vagueness doctrine should not apply where government subsidizes speech; and (2) "decency and respect" are no more vague than artistic merit and excellence. Neither argument withstands scrutiny.[44]

A. Government Programs Allocating Subsidies To Private Speech Are Subject To Constitutional Vagueness Standards

The government cites no precedent for its view that statutes are exempt from void-for-vagueness scrutiny unless they are coercive. Pet.Br. at 46-49. It relies upon an analogy to *Rust v. Sullivan*, 500 U.S. 173, yet *Rust* itself expressly stated that the vagueness doctrine applies to funding decisions in "traditional sphere[s] of free expression . . . fundamental to the functioning of our society" *Id.* at 200 (citing *Keyishian*, 385 U.S. at 603, 605-06).

This Court has repeatedly applied vagueness standards to laws that affect intellectual inquiry in an academic

[44] In the last paragraph of its brief, the government also argues that the statute should not be invalidated because notwithstanding its earlier implementation, the NEA might someday remedy its vagueness through unspecified regulations. Pet.Br. 50. Such unadorned speculation about whether an agency might promulgate narrowing regulations cannot defeat a facial vagueness challenge to a statute governing speech. On this theory, the ordinance governing newsrack permits in *City of Lakewood* would not have been facially unconstitutional because the mayor might in the future have adopted a narrowing policy. But as the Court stated, the chilling effects created by such statutes "can be effectively alleviated only through a facial challenge." 486 U.S. at 757. In any event, §954(d)(1), like the loyalty oath invalidated in *Baggett v. Bullitt*, 377 U.S. 360, 378 (1964), is not susceptible to a narrowing construction because it is "not subject to one or a few interpretations but to an indefinite number."

setting, even where only government employment -- a benefit -- is at stake. In *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961), *Baggett v. Bullitt*, 377 U.S. 360, and *Keyishian*, 385 U.S. 589, the Court held void for vagueness loyalty oath and anti-sedition requirements for public academic employment. In all three cases, the Court emphasized the dangerous chilling effect of laws restricting government-funded intellectual activity. *See Baggett*, 377 U.S. at 371-72; *Keyishian*, 385 U.S. at 599, 601 (finding that vague oath would "stifle 'that free play of the spirit which all teachers ought especially to cultivate and practice'")(quoting *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952)(Frankfurter, J., concurring)).

Outside the academic setting, the Court has also applied First Amendment vagueness principles to noncoercive government programs affecting expression, in public forums, *see, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131-33 (1992); *City of Lakewood*, 486 U.S. at 770, and in non-public forums, *see Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569, 575 (1987). In each of these cases it could have been said that the government's "use of imprecise standards for awarding [benefits] does not penalize speech in any meaningful sense," Pet.Br. at 47.[45]

[45] Lower courts have routinely applied vagueness analysis to government programs that subsidize speech. *See, e.g., Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 512-14 (9th Cir. 1988)(vague standards for film certification by U.S. Customs, including whether material "lends itself to misinterpretation or misrepresentation of the United States or other countries" or "augment[s] international understanding and good will"); *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1035-40 (D.C.Cir. 1980)(vague definition of "educational" for purposes of tax exemption); *Shamloo v. Mississsippi State Board of Trustees*, 620 F.2d 516 (5th Cir. 1980)(vague requirement of "wholesomeness" for student activity fund approval); *Gay Men's Health Crisis v. Sullivan*, 792 F.Supp. 278, 295 (S.D.N.Y. 1992)(vague standard of "offensive[ness] to a majority of

(continued...)

As the district court found, vague laws governing the allocation of benefits to speech raise the same concerns that laws governing penalties pose: they fail to give fair notice of the governing legal standards; they chill excessive amounts of protected speech; and they invite arbitrary and discriminatory decisionmaking. Pet.App. 78a; *see also Keyishian*, 385 U.S. at 597-604; *City of Lakewood*, 486 U.S. at 757-58. Thus, there is no reason to excuse laws governing speech subsidies from all vagueness scrutiny. And even under the most minimal scrutiny, the "decency and respect" standard must fall.

B. Artistic Excellence Is Not Vague Because It Relies Upon A Common Core Of Professional Expertise And Does Not Create A Chilling Effect

The government argues that because "decency and respect" are no more vague than artistic excellence, it must be as permissible for the NEA to apply the former standard as it is to apply the latter. But standards of artistic merit, like standards of academic merit, are informed by a common language and education in the relevant discipline, and are applied by experts trained to make professional judgments. Moreover, artistic and academic merit standards do not exert the kind of chilling effect that "decency and respect" do.

This Court has recognized that public universities necessarily make judgments about academic merit, and has never intimated that such judgments are void for vagueness.

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[45] (...continued)
adults" for funding of health education materials); *Bella Lewitzky Dance Foundation v. Frohnmayer*, 754 F.Supp. at 781-82 (vague requirement that NEA grantees certify that they will not produce works that "in the judgment of" the NEA, "may be obscene").

In fact, it defers to such judgments as long as they are made by professionals applying academic merit standards. *Board of Curators v. Horowitz*, 435 U.S. 78, 90 (1978); *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985); *see also San Filippo v. Bongiovanni*, 961 F.2d 1125, 1137 (3d Cir.)(upholding academic merit standard against a vagueness challenge), *cert. denied*, 506 U.S. 908 (1992).

Academic merit is not vague because the term has gained meaning through a long history of application by professionals trained in making precisely those judgments. *Cf. Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154, 159 (1971)("character and general fitness" bar admission standard is not vague because "[l]ong usage in New York and elsewhere has given well-defined contours to this requirement"); *Gentile v. State Bar*, 501 U.S. 1030, 1049 (1991)(in assessing vagueness, courts should look to whether terms have "settled usage or a tradition of interpretation").[46] We all rely on such judgments: universities and law schools in admissions,

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[46] This explains the unanimity among circuit courts in recognizing the expertise of academics to make professional judgments about academic merit within their disciplines. *See, e.g., Gutzwiller v. Fenik*, 860 F.2d 1317, 1333 (6th Cir. 1988)(courts should generally defer to the expert judgments of academic professionals); *Zahorick v. Cornell University*, 729 F.2d 85, 93 (2d Cir. 1984)(courts must review tenure decisions for traditional evidence of bias, but cannot master academic fields sufficiently to second-guess peer judgments). Courts have also recognized and approved the widespread adoption by universities of the American Association of University Professors' (AAUP) standards, including peer review as a primary mechanism for determining academic merit. *See* David M. Rabban, "Symposium of Academic Freedom: Does Academic Freedom Limit Faculty Autonomy?", 66 Tex.L.Rev. 1405, 1408-10 (1988); *Browzin v. Catholic University of America*, 527 F.2d 843, 847 n.8 (D.C. Cir. 1975)(AAUP standards represent "widely shared norms within the academic community").

grading, hiring and tenure; and employers in determining whom to interview and hire.

The same is true of artistic merit. Here, too, there is a long tradition of professionals trained in the discipline who have developed and applied standards of artistic merit. Again, we rely on those decisions every day, in making judgments about whom to hire and admit in university arts programs, in deciding which artists to include in private and public museums and collections, and in determining who deserves public and private foundation grants. Artistic merit, like academic merit, is not reducible to a simple formula, but the profession nonetheless is guided by a set of consensus standards. Experts will, of course, differ in their judgments about these qualities, but at least they are speaking a common language derived from a common body of knowledge. The existence of disagreement about a standard does not make it wholly indeterminate.[47]

By contrast, "general standards of decency" and "respect for the diverse beliefs and values of the American public" have no common core of meaning, and no profession whose historical task has been to make judgments about them. While NEA officials "possess an expertise in determining 'artistic excellence and artistic merit' that will guide their application of these criteria; they have no

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[47] Indeed, this Court itself has relied upon judgments of artistic merit. Its obscenity doctrine distinguishes between protected and unprotected speech in part on the basis of an objective determination of "serious artistic value." *Miller* v. *California*, 413 U.S. 15, 24 (1973); *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987). And such decisions often turn on expert critical evaluation, *see, e.g., Jacobellis v. Ohio*, 378 U.S. 184, 196 (1964)(noting high critical regard enjoyed by Louis Malle's *The Lovers* in reversing an obscenity conviction); *Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992)(reversing judgment of obscenity that disregarded credible expert evidence of a song's artistic value); *United States v. One Book Entitled Ulysses*, 72 F.2d 705 (2d Cir. 1934)(considering artistic merit in finding *Ulysses* not obscene).

corresponding expertise in applying such free-floating concepts as 'decency' and 'respect.'" Pet.App. 19a n.18.

Finally, standards of academic or artistic merit do not chill the exploration or expression of provocative, unconventional, unpopular, or "offensive" ideas. Artists and arts institutions competing for grants, like students competing for academic awards or professors competing for tenure, know by virtue of their education and their participation in the arts/academic community what the relevant standards of excellence are, and they are not likely to be chilled in striving to meet those standards by fear of ideological discrimination. "General standards of decency and respect for the diverse beliefs and values of the American public," by contrast, chill the type of provocative expression that is at the heart of academic and artistic freedom, and invite precisely the type of arbitrary and discriminatory decisionmaking that the void for vagueness doctrine guards against.[48]

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[48] These differences refute the government's claim that "decency and respect" are somehow implicit in the definition of "artistic merit." Pet.Br. 26,45. In fact, these critera flatly contradict principles of artistic excellence because the best art often questions conventional beliefs and provokes strong reactions. *See* Briefs *Amici Curiae* of Claes Oldenburg, *et al.*, Volunteer Lawyers for the Arts, *et al.*; J.A. 13 (statement by NEA Opera-Musical Theater Overview Panel that decency and respect are "irrelevant to the consideration of artistic excellence"). There are numerous great works of art or literature that could be considered indecent or disrespectful of the "beliefs and values" of some segment of the population, from Homer's *The Iliad* to Titian's *Rape of Europa* to Tony Kushner's *Angels in America*. *Cf. ACLU v. Reno*, 929 F.Supp. 824, 852-53 (E.D.Pa. 1996)(opinion of Sloviter, J.), *aff'd*, 117 S.Ct. 2329 (1997). Many of the world's greatest operas would likely fall prey to the "decency and respect" clause. Mozart's *Don Giovanni* features rape, promiscuity, and wife beating; Verdi's *La Traviata* includes prostitution and drinking; Puccini's *Tosca* concerns extramarital sex, torture, and sacrilege; Strauss's *Salome* features necrophilia; and

(continued...)

IV. THE "DECENCY AND RESPECT" CLAUSE IS AN UNCONSTITUTIONAL CONDITION

The decency and respect provision also violates the First Amendment because it imposes an unconstitutional condition on would-be recipients of NEA grants. The provision does not merely define or limit the use of government funds, but instead makes "decency" and "respect" part of "the criteria by which applications are judged." 20 U.S.C. §954(d)(1). Since "artistic merit" requires assessment of an applicant's prior work, the "decency and respect" restrictions extend beyond the government grant and reach work created solely with nonfederal funds. Any artist, curator, theater producer, or publisher who thinks she might apply for an NEA grant in the future will be chilled in the art that she creates today, for fear that an NEA official's judgment that it is "indecent" or "disrespectful" will count against her in the application process. J.A. 24-26.

Where government imposes a condition on speech that extends beyond defining the scope of speech in a funded program, "thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program," it violates the First Amendment. *Rust*, 500 U.S. at 196. In *FCC v. League of Women Voters*, 468 U.S. at 400, for example, the Court struck down an FCC requirement that public broadcasting stations refrain from all editorializing if they received any federal funds, because the requirement barred the station "from using even wholly private funds to finance its editorial activity."

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[48] (...continued)
Wagner's *Die Miestersinger* reflects anti-Semitism, while his *Die Walküre* highlights incest. *See also* Pet.App. 28a (Kleinfeld, J., dissenting)(noting indecent and disrespectful styles and themes in works of Chaucer, Shakespeare, Aristophanes, Nabokov, Twain, and Joyce).

By conditioning eligibility for an NEA grant on a consideration of whether applicants have produced "indecent" or "disrespectful" art on their own time and with nonfederal funds, the "decency and respect" provision similarly penalizes speech beyond the government program, and violates the First Amendment. As one court of appeals presciently explained:

> If public authorities conclude that they may . . . limit[] participation in certain activities by recourse to past speech, the following . . . [is] within the realm of possibility. In setting eligibility requirements for the admission of artists to a municipal exhibit of, say, political or historical works, authorities might specify the exclusion of artists who in the past had produced sexually explicit works. Such artists, therefore, may feel pressure to sanitize their labors out of a concern that they may be excluded from future exhibits.

Ackerley Communications of Massachusetts, Inc. v. City of Somerville, 878 F.2d 513, 519 (1st Cir. 1989). The "decency and respect" clause has precisely that effect, and therefore imposes an unconstitutional condition.[49]

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[49] The courts below declined to reach this issue, but it is nonetheless an appropriate ground for affirmance. The district court believed that it could not consider how the statute would be implemented on a facial challenge, and that there was a dispute of fact concerning whether the NEA applies its criteria to applicants' past work. Pet.App. 79a. But courts may consider how a statute is implemented in adjudicating a facial challenge. *See, e.g., Forsyth County*, 505 U.S. at 131. And there is no dispute that the NEA considers prior work in making grant decisions. Plaintiffs identified this as an undisputed fact, J.A. 18, and defendants' statement of genuine issues did not dispute it. J.A. 74. The record contains uncontradicted evidence demonstrating that the NEA considers an applicant's past work in judging applications, including the
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CONCLUSION

For all of the above reasons, the judgment of the court of appeals should be affirmed.

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[49] (...continued)
NEA's own guidelines. *See 1992 Guidelines*, *supra* n.10, at 58; *1999 Guidelines*, *supra* n.10, at 10-11, 14, 16-17, 20. The only evidence defendants submitted on this issue confirms that the NEA considers applicants' past work. J.A. 81 (former Deputy Chairman McAusland explains that panels "consider information pertaining to an applicant's relevant 'body of work' to assess the applicant's standing and significance in the relevant field"). Thus, no dispute of fact precludes decision on this aspect of plaintiffs' challenge, and it provides an alternative ground for affirmance.

The court of appeals reasoned that "the district court denied summary judgment . . . and this denial of summary judgment is not appealable." Pet.App. 3a n.1. In fact, the district court *granted* summary judgment on plaintiffs' sixth claim, which challenged the constitutionality of the "decency and respect" provision, and simply declined to grant relief on this particular argument in favor of that claim. It is well-established that this Court or the court of appeals may affirm a grant of summary judgment for any non-waived reason, including reasons rejected by the district court. *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982); *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957); Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE §3904, at 199-201 (1992). Plaintiffs advanced this argument to both lower courts, and this Court may properly consider it.

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